Office-Supreme Court, U.S.
FILED
MAY 28 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., *Petitioner,*

v.

HYDROLEVEL CORPORATION, *Respondent.*

On A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

MEMORANDUM OF THE AMERICAN INSTITUTE OF MINING, METALLURGICAL, AND PETROLEUM ENGINEERS, INC., AS AMICUS CURIAE

GEORGE D. WEBSTER*
RICHARD H. MANSFIELD III
WEBSTER, CHAMBERLAIN & BEAN
1747 Pennsylvania Ave., NW
Suite 1000
Washington, D.C. 20006
(202) 785-9500
Attorneys for Amicus Curiae

**Counsel of Record*

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

PAGE

INTEREST OF AMICUS 1

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT

I. This Court Should Grant Certiorari to Determine The Applicable Standard Of Liability Of A Professional Association Whose Members, Without The Knowledge Or Support Of The Association, And Without Intending To Benefit The Association, Conspire To Violate The Antitrust Laws. 5

II. There Presently Exists An Adequate Remedy For Third Persons Who Are Harmed By The Unlawful Acts Of Agents Purporting To Act On Behalf Of Their Principals 7

III. The Court Should Grant Certiorari To Review The Restraint The Second Circuit's Ruling Would Have On The Ability Of Professional Associations To Effectively Publish And Disseminate Information 8

IV. If The Principle Announced In The Court Below Goes Unchallenged, The Courts Will Become Flooded With Unnecessary And Time-Consuming Litigation 9

V. The Court Should Grant Certiorari To Review The Impact The Panel's Decision Will Have On The Viability Of Voluntary Organizations 10

A. Voluntary Associations Are Essential To The Maintenance Of Individual Freedom And The Functioning Of A Democracy 10

B. The Panel's Decision Will Prevent Voluntary Associations From Serving Their Historic Functions 12

C. The Panel's Decision Could Deprive The Public Of The Practical And Philosophical Advantages Of Voluntary Associations 14

CONCLUSION 17

TABLE OF AUTHORITIES

CASES: PAGE

American Tobacco Co. v. *United States*, 328 U.S. 781 (1946) 6

Cement Mfrs. Protective Ass'n v. *United States*, 268 U.S. 588 (1925) 6

De Jonge v. *Oregon*, 299 U.S. 353 (1937) 12

Ingram v. *United States*, 360 U.S. 672 (1959) 6

Kiefer-Stewart Co. v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951) 6

NAACP v. *Alabama*, 357 U.S. 449 (1958) 12

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) ... 9

Perma Life Mufflers, Inc. v. *International Parts Corp.*, 392 U.S. 134 (1968) 6

Roth v. *United States*, 354 U.S. 476 (1957) 9

United Mine Workers of America v. *Coronado Coal Co.*, 259 U.S. 344 (1922) 5

United States v. *Corn Derivatives Institute*, 1932-1939 Trade Cases, ¶ 55,002 at 18 (N.D. Ill. 1932) 6

United States v. *Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972) *cert. denied*, 409 U.S. 1125 (1973) 5

BOOKS:

De Tocqueville, *Democracy in America*, Edited by J. P. Mayer and Max Lerner, New York: Harper and Row, 1966 11

STATUTES:

15 U.S.C. §1 (1976) (The Sherman Act) ..... *passim*

26 U.S.C. §501(c)(3) (1976) 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1765

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., *Petitioner,*

v.

HYDROLEVEL CORPORATION, *Respondent.*

On A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

MEMORANDUM OF THE AMERICAN INSTITUTE OF MINING, METALLURGICAL, AND PETROLEUM ENGINEERS, INC., AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The American Institute of Mining, Metallurgical, and Petroleum Engineers ("AIME"), of New York, founded in 1871, is a non-profit volunteer organization exempt from taxation under section 501 (c)(3) of the In-

ternal Revenue Code. The purpose of AIME is to disseminate knowledge of the arts and sciences involved in the production and use of minerals, metals, energy sources and materials. The AIME is the parent association of four constituent societies, each with its own board of directors. These societies are: the Society of Mining Engineers of AIME, the Metallurgical Society of AIME, the Iron and Steel Society of AIME, and the Society of Petroleum Engineers of AIME. Collectively, these groups have over 80,000 members, most of whom are engineers.

AIME's services to its members are somewhat different in nature than those offered by Petitioner to its members. ASME develops standards[1] and guidelines involving both consumer and commercial products and tools of the trade used by engineers and manufacturers. AIME, on the other hand, is more involved in disseminating information and professional knowledge to its members. Toward this end, AIME publishes books and professional journals and holds numerous professional meetings designed to inform members of new advances in various technological fields.

AIME is principally involved in providing a forum for the exchange of knowledge of techniques employed to recover the earth's minerals and energy resources and to converting them to useful products. The advances

---

[1] The holding below is certain to have numerous adverse affects on voluntary membership associations involved in promulgating standards. A standard is a description published by an association, detailing in layman's terms certain characteristics of products. Standards are helpful both to consumers and manufacturers alike since they make available useful information concerning the safe use and construction of products. Such topics as strength, safety and performance are addressed in a typical standard.

made in past years in mineral recovery have been aided greatly by the activities of AIME. Without the research and technological advances achieved by the voluntary members of AIME, the United States energy production and mineral recovery could not have reached present levels. It is for this reason that AIME's services to mining, metallurgical and petroleum engineers are vitally important, not only in processing the earth's resources, but also in helping to ensure economic stability and energy self-sufficiency.

AIME is engaged in developing standards, but to a much lesser extent than is ASME. While ASME promulgates standards relating to the actual products and machinery used by mechanical engineers, manufacturers and consumers, AIME's few standards concern processes used to extract oil and minerals from the earth. For example, AIME has developed uniform standards for formulas used in resevoir engineering. These standards apply to symbols used by petroleum and mining engineers and enable a much more efficient yield of oil and gas when they are being produced from the underground reservoir.

The present case presents an unconventional and potentially harmful precedent as to the antitrust liability of professional associations. AIME and many other associations stand to suffer great losses both in the voluntary support of individual members and in the operation of services unless the panel's decision is reviewed and overturned. As the arguments which follow point out, there would be too many risks of liability involved in serving a professional organization if the reasoning of the Second Circuit is allowed to prevail. The AIME believes that its experience and comments on this case will provide this Court with helpful insight in addressing the issues raised.

INTRODUCTION AND SUMMARY OF ARGUMENT

The present case raises significant questions both as to the liability of professional associations for the unlawful acts of their agents, who, while acting within the scope of apparent authority, violate antitrust laws, and as to the meaning of such terms as "contract," "combination" and "conspiracy" as those terms apply to antitrust litigation.

The decision below promulgates a new basis upon which antitrust liability may be predicated and poses potentially disasterous consequences for professional associations which rely on the voluntary participation of their members. The limits of this new standard of liability will cast a shadow of uncertainty over the acts of professional associations.

How such a principle is to be applied or, indeed, whether it can logically be applied in antitrust litigation is an issue which calls for a determination from this Court. If the ruling of the Second Circuit is allowed to stand unscrutinized, the courts will become burdened with unnecessary litigation and voluntary associations and the industries and communities they serve will suffer. There seems little need to destroy the sound principles of actual agency in favor of less reliable rules advocating antitrust liability of innocent and "unintentional" participants.

ARGUMENT

I. This Court Should Grant Certiorari To Determine The Applicable Standard Of Liability Of A Professional Association Whose Members, Without The Knowledge Or Support Of The Association, And Without Intending To Benefit The Association, Conspire To Violate The Antitrust Laws.

Of great concern to incorporated and voluntary associations everywhere is this decision's impact on the ability of such organizations to function normally without fear of unfounded antitrust reprisals. Specifically, the Second Circuit's sweeping abandonment of traditional case law defining the conditions under which a voluntary association may be held liable for violations of the Sherman Act will undoubtedly require more judicial review before the meaning of this case becomes clear.

For decades, associations have relied on the premise that where an agent acts unlawfully without intending to benefit his principal, the principal cannot, without ratifying those acts, be held accountable for them. *See,* e.g., *United Mine Workers of America* v. *Coronado Coal Co.* 259 U.S. 344 (1922); *United States* v. *Hilton Hotels Corp.* 467 F. 2d. 1000 (9th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973). These decisions concur in their holding that there must exist some kind of actual authority on the part of, or benefit accruing to, the principal before liability can arise. An alternative requirement, as, for example, when an organization ratifies the unlawful act of one of its agents thereby condoning it, is based on sound and established agency principles. The panel now seeks, through a novel gloss on the law of agency, to change the liability standard to one of apparent authority whereby a principal would be liable for unlawful behavior of agents who act within the scope of authority

as determined by a third person. The panel's reasoning in reaching this result depends largely on seldom followed and narrow agency and tort precepts. According to the Second Circuit, the ruling case law in this area, including important decisions by this Court, ought now to be cast aside in favor of a standard which depends for its credibility on misapplied examples in the Restatement 2d of Agency and on one decision involving a bill of lading which has nothing whatever to do with antitrust law.

A rule of law establishing liability without fault in antitrust cases would call into question the very meaning of the requirement that those charged with violation of the Sherman Act must form a "conspiracy," "contract" or "combination." Numerous cases have held that where a conspiracy or combination exists, there must at least be a "unity of purpose" or "common design," *American Tobacco Co.* v. *United States* 328 U.S. 781 (1946); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.* 340 U.S. 211 (1951), or "*at least* the degree of criminal intent necessary for the substantive offense itself." *Ingram* v. *United States* 360 U.S. 672, 678 (1959). This Court has repeatedly held that unless concerted action by two or more parties exists, no contract, combination or conspiracy as required under Section One of the Sherman Act can be found, *Cement Mfrs. Protective Ass'n.* v. *United States,* 268 U.S. 588, 602-06 (concerted action not shown and no unlawful restraint accrued); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 144 (1968) (White, J., concurring). Thus, participation by two persons or parties is an essential element of a violation of the Sherman Act.[2]

---

[2] This principle was followed in *United States* v. *Corn Derivatives Institute*, 1932-1939 Trade Cas.¶ 55,002 at 18 (N.D. Ill. 1932)

Under the Second Circuit's reasoning, an association such as AIME would be held accountable for antitrust violations if it did nothing to participate in a common design and did not perform a critical act with a specific intent of accomplishing that act. Liability would arise even if the association was without knowledge of the act and was incapable of benefitting from it. In short, associations would be capable of violating the antitrust acts without conspiring, contracting or forming a combination with anyone for that purpose. This curious principle will surely yield incongruous results since one man standing alone cannot be a conspirator.

The decision below seems all the more unaligned with both classical antitrust and agency theory in its determination that the professional association involved, ASME, was an unintentional participant in its volunteers' conduct. (A:26, 635 F. 2d at 131.) This means that at best, ASME might have been negligent. A theory of negligence is out of place in antitrust law.

Because of the treble damage aspect of the Sherman Act, standards of liability should not be lightly or confusingly applied unless there is a sound and logical basis behind such standards. To hold otherwise would subject innocent parties to the harshest of penalties.

II. There Presently Exists An Adequate Remedy For Third Persons Who Are Harmed By The Unlawful Acts Of Agents Purporting To Act On Behalf Of Their Principals.

For competitors injured by the acts of fellow competitors who are incidently officials of professional

---

where the court held that "the words 'acting in concert' as used in this decree shall mean by mutual agreement, understanding, plan, device, or contrivance entered into or employed by any two or more defendants. . ."

associations, there presently exists an adequate remedy provided by the antitrust laws. In the case below, the agents acted to benefit not the American Society of Mechanical Engineers, but rather their own corporations. The sole remedy should be against the principal of the wrongdoers: their corporate beneficiaries. In this manner the purpose of the antitrust laws is more fully served. The public is not protected—indeed it is certainly harmed—where liability is imposed on innocent parties, especially where those parties are voluntary organizations existing to assist in keeping the market place safe. The remedy should be directed not at closing down or limiting the activity of such organizations but rather at punishing the parties responsible for the harm caused. Seen in this light, the panel's decision requires careful consideration by this Court.

III. The Court Should Grant Certiorari To Review The Restraint The Second Circuit's Ruling Would Have On The Ability Of Professional Associations To Effectively Publish And Disseminate Information.

Professional associations which publish standards and disseminate professional knowledge as an adjunct to serving their members and the public must not be restrained in their freedom to publish simply because some of their apparent agents have the ability to misuse the publication process. The panel announced that "[I]mposing liability on the principal will induce greater care to prevent misconduct by agents occupying especially sensitive or responsible positions that invite reliance" (A:14, 635 F. 2d at 125). This is an unsupported and potentially dangerous manner in which to curb misconduct by agents of an association.

First, it severely limits the ability of an organization to freely publish guidelines for the members it serves. If

the publishers of newspapers and other periodicals were held liable for every instance of concealed employee misconduct there would exist few entities willing to take the risks involved in exercising free speech. Second, the limitations imposed by the Second Circuit would result in the type of restraint on speech which this Court has long condemned. Though acts of fraud are not protected by the First Amendment, there must exist freedom to assure an unfettered interchange of ideas, *Roth* v. *United States,* 354 U.S. 476 (1957) and the widest possible dissemination of information *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964). This freedom would surely be restrained to an unreasonable degree if all organizations were put in the position of being unable to publish opinions or standards necessary to the people they serve simply because a novel and heretofore unaccepted standard of antitrust liability rendered such speech too risky to be carried on.

IV. If The Principle Announced In The Court Below Goes Unchallenged, The Courts Will Become Flooded With Unnecessary Litigation On Behalf Of And Directed Against Associations

The potential result inherent in the opinion below portends an enormous overload in litigation for professional associations which for years have relied upon well founded agency principles. This flood of litigation need not and should not become a reality. A review of the Second Circuit's opinion would avoid the necessity of further litigation in this area and would give needed interpretation to an area of law which is now, due to the present case, unsettled. It is unlikely that organizations affected by this novel ruling will be able to withstand the increased liability which will shortly follow without resorting to the courts in an effort to repair the damage left by the decision below.

V. The Court Should Grant Certiorari To Review The Impact The Panel's Decision Will Have On The Viability Of Voluntary Organizations.

It is clear that there are sound legal arguments for why a non-profit, voluntary professional organization should not be found liable for the unauthorized acts of its volunteers. There are also large philosophical and political implications of a court opinion which significantly expands the potential liability of voluntary associations, and thus makes it significantly more difficult for these associations to perform services for their members and the public.

A. Voluntary Associations Are Essential To The Maintenance Of Individual Freedom And The Functioning Of A Democracy.

Voluntary associations, and voluntarism in general, have been linchpins of American democracy. They are the outgrowth of the unprecedented freedom enjoyed by the American people, and are manifestations of the uniquely American awareness that freedom, individualism, and independence, if they are to be meaningful and enduring, must be tempered by restraint, collective action, and unselfish participation. From the very beginning of the American revolution, when the Minutemen confronted the British at Lexington and Concord and Paul Revere took it upon himself to warn his countrymen of the impending invasion, until now, when a multitude of voluntary professional organizations oversee the conduct and standards of their constituent professions, Americans have prided themselves on their ability to solve problems and serve needs without prodding from a centralized bureaucracy. They have cherished their freedoms and the opportunities for individual development which those freedoms have nourished, but

when necessary, they have not hesitated to band together and sacrifice their private interests to the public good.

Many observers have recognized the central importance of voluntarism to a democratic society. Alexis de Tocqueville devoted an entire chapter of his book *Democracy in America* to voluntary associations. He marveled at the number and variety of associations that had arisen in America, seeing a direct correlation between the myriad of associations in America and the spirit of equality that pervaded the nation. Unlike aristocratic societies where a few individuals have the power and wealth to accomplish great things, democracies consist of many individuals who by themselves are "independent and weak," and able to "do hardly anything for themselves."[3] In a country where political and economic power is decentralized, individuals have no choice but to "learn some habits of acting together in the affairs of daily life."[4] Indeed,

> "In democratic countries, knowledge of how to combine is the mother of all other forms of knowledge; on its progress depends that of all the others . . . If men are to remain civilized or to become civilized, the art of association must develop and improve among them at the same speed as equality of conditions spreads."[5]

In De Tocqueville's opinion, an association voluntarily entered into by individuals is far superior to the government in undertaking important enterprises. He recognized that government cannot "cope with every industrial undertaking beyond the competence of one in-

---

[3] Alexis de Tocqueville, *Democracy in America*, edited by J. P. Mayer and Max Lerner, New York: Harper & Row, 1966, 488.

[4] De Tocqueville, 488.

[5] De Tocqueville, 488.

dividual," and that if it so attempted, the commercial, industrial and moral strength of the nation would decline.[6] Voluntary associations, thought de Tocqueville, are not only more efficient than the government, but also more supportive of a vigorous, free, well-informed, and generous citizenry.

Partly as a result of De Tocqueville's observations, the Supreme Court has extended the protection of the First Amendment to the right of association. *NAACP* v. *Alabama* 357 U.S. 449 (1958); *De Jonge* v. *Oregon* 299 U.S. 353 (1937). As with freedom of speech and the press, any law infringing upon an individual's right to associate is subject to strict judicial scrutiny. The fact that association has been given the full protection of the First Amendment is evidence of its supreme importance in American life.

B. The Panel's Decision Will Prevent Voluntary Associations From Serving Their Historic Functions.

The panel's decision extends the potential liability of voluntary associations to an unprecedented and dangerous degree. By the panel's reasoning, a voluntary association is liable under the Sherman Act for any illegal act of a volunteer member, even if the association disapproves of what the member is doing, is deceived by the member for his own ends, and is in no way benefited by the member's actions. To make matters worse, if found liable under the Sherman Act, an association must pay treble damages.

Adherence to the panel's reasoning will effectively put an end to many association functions. Organizations

---

[6] De Tocqueville, 487.

may conclude that the benefits flowing to the public from their activities do not warrant assumption of the disproportionate risks and burdens imposed by the panel's decision.

There are four reasons in particular why associations cannot survive the increased liability inherent in the panel's decision. First, if the Circuit Court's decision is allowed to stand, private organizations will be unable to contend with the administrative burden of policing each of its volunteer members to ensure that none are engaged in illicit activities. To detect wrongdoing, the organization would have to monitor all of the activities, affairs, correspondence, and transactions of its members. No voluntary association, with its limited budget and human resources, can hope to accomplish such a task. Second, an organization that presumes to inspect the private business of its individual members will be less attractive to potential members. Part of the value of working through a voluntary association as opposed to the government, is the more informal, streamlined approach it allows individuals to take in problem solving. Members of voluntary associations presently enjoy the privacy to freely exercise their professional judgement within the guidelines established by their associations. But if these individuals are subject to constant monitoring from the organization and are required to adhere to a series of meddlesome regulations, the advantages of association will significantly diminish. Third, the panel's decision will encourage potentially frivolous suits against voluntary associations. Such actions are likely to be brought by parties who lack strong positions on the merits but who nevertheless assume the risk of litigation in hopes of winning treble damages. Even if most of these suits are unsuccessful, the costs of defending against them will be enormous. Finally, the decision will

discourage volunteer efforts by individuals fearful of exposing themselves to liability, and will induce many employers to forbid their employees to participate in an organization's activities.

C. The Panel's Decision Could Deprive The Public Of The Practical And Philosophical Advantages Of Voluntary Associations.

As voluntary associations abandon their former roles in response to the panel's decision, their functions will be either discontinued altogether or assumed by federal, state, and local governments. One does not have to agree with De Tocqueville that "knowledge of how to combine is the mother of all other forms of knowledge" to see that associations perform innumerable benefits for society, and that in their absence, many of the tasks businesses and individuals now take for granted will go undone. Certainly, the performance of many industries will decline as they are deprived of the data and technical information presently made available by associations. This is unfortunate, for productivity is already at a low ebb in this country. The lack of ethical guidelines provided by voluntary associations, meanwhile, will no doubt cause confusion among professionals and business executives.

AIME holds a unique position in the realm of professional associations. Its work and services to engineers would be placed in jeopardy if its volunteer members felt they could no longer serve AIME without subjecting themselves to serious risks. Should AIME become handicapped and forced to discontinue its work in the fields of mineral and energy development, the United States would suffer a great loss, not only in the decline in excellence of American engineering but also in economic

stability. For the United States to depend upon its energy and mineral producing capabilities, it must be able to depend on competent and readily available information of the type a professional association such as AIME provides.

The alternative—government assumption of association tasks—is not a promising solution. With respect to the promulgation of standards and codes, for example, no government can be expected to establish regulations of the quality and thoroughness maintained by the private organizations. Governments, after all, have little familiarity with subjects as specialized as safety in the mechanical engineering industry, and would probably devote neither the time nor the money necessary to ensure the development of reasonable and sound standards. Yet, even in the unlikelihood that the government could promulgate adequate standards, the taxpayer and consumer would suffer. An added layer of bureaucracy—engineers, lawyers, scientists—would be created to process, research, draft and distribute the regulations. This of course would increase taxes, paperwork, and the overall administrative burden on the average citizen. All in all, on a practical level the government would be vastly inferior to private organizations in setting, administering, and interpreting standards for the engineering profession.

Aside from practical considerations, the Court must consider the philosophical issues discussed by de Tocqueville. The judiciary must cast a wary eye on developments which in the long run threaten to result in government encroachment on the rights of the individual. If allowed to stand, the panel's opinion will do just that. In effect, it will discourage individuals associated with a particular profession from banding

together in an effort to serve a vital need of that profession. The resulting vaccuum, if filled at all, will be filled by government. Thus, the cycle that De Tocqueville so feared will be complete: an action by the government—in this case the judiciary—rendering private individuals helpless to act for themselves on an enterprise of importance, thus leaving the government to assume responsibility for the enterprise, which will result in increasing popular dependence on the government and further weakening the ability of individuals to fend for themselves.

Every such completed cycle makes the private individual slightly less free, independent, vigorous, imaginative and magnanimous, and the central authority slightly more cumbersome, inefficient, arrogant, ambitious, and overweaning. The net effect is a gain of government at the expense of private individuals. Such a result contradicts the current mood of the populace and the current thrust of legislation. Thus, the Court must be given an opportunity to exercise its historic and constitutional responsibilities in reaffirming the right and ability of individuals to assemble with one another on a voluntary basis to solve problems affecting the public welfare.

CONCLUSION

For the reasons stated herein the petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE D. WEBSTER
RICHARD H. MANSFIELD III
WEBSTER, CHAMBERLAIN, & BEAN
1747 Pennsylvania Ave., NW
Suite 1000
Washington, DC 20006
(202) 785-9500
Attorneys for Amicus Curiae